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TERRITORY AND THE CONSTITUTION.

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The questions of constitutional law arising out of our recent territorial acquisitions are about to be determined not as political questions but as matters of law, in accordance with rules of law, by the Supreme Court of the United States. In view of the well known adherence of that court to the rule of *stare decisis* it is obvious that its decision will be largely swayed by the earlier decisions of that Court on the points involved.

The controversy so far has been waged chiefly over the terms of the following clauses of the Constitution:

"The Congress shall have power: 1. To lay and collect taxes, duties, imposts and excises; to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." (Art. 1, Sec. 8.)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." (Fourteenth Amendment, Sec 1.)

Incidentally, too, the clause in the Thirteenth Amendment prohibiting slavery "within the United States *or any place subject to their jurisdiction*" has come in for a wholly unmerited share of citation in the discussion.

I.

A fruitful source of difficulty in discussing this subject has been confusion of the term "territory of the United States" used in the Constitution, with the familiar colloquial term, unknown to that instrument, "the Territories." The idea seems to have obtained among many laymen that "the Territories" have a standing under the Constitution superior to that of unorganized districts of Federal land. The idea is wholly with-

out foundation. Congress may organize "a Territory" and then abolish it and restore the tract to its former unorganized condition, without in any degree affecting the applicability of the Constitution therein. Indeed, this seems to have been done in at least one case.

We find both terms used in strong antithesis in a recent case in the United States Supreme Court as follows:

"*All territory within the jurisdiction of the United States not included in any State* must necessarily be governed by or under the authority of Congress. *The Territories are but political subdivisions of the outlying dominion of the United States.* Their relation to the general government is much the same as that which counties bear to the respective states, and Congress may legislate for them as a State does for its municipal organizations." (*National Bank* v. *Yankton*, 101 U. S. 133.)

In 1820, Chief Justice Marshall defined the term, "the United States" as meaning, "The whole of the American Empire," "Our great Republic which is composed of States and Territories." He adds: "The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania." (*Loughborough* v. *Blake*, 5 Wheat. 319.) In a later case, Chief Justice Taney, speaking of constitutional restraints on the powers of Congress, says:

"This prohibition is not confined to the states, but the words are general, *and extend to the whole territory over which the Constitution gives it* (*Congress*) *power to legislate*, including those portions of it remaining under territorial government, as well as that covered by states. It is a total absence of power *everywhere within the dominion of the United States.*" (19 How. 450.)

In the same case Justice McLean, though dissenting on some other points not now involved, says:

"The sovereignty of the Federal Government extends to *the entire limits of our territory.* * * * The Constitution was formed for *our whole country.*" (19 How. 543, 544.)

And Justice Curtis, also dissenting, says:

"I construe this clause, therefore, as if it had read, *Congress shall have power to make all needful rules and regulations respecting those tracts of country, out of the limits of the several States, which the United States have acquired, or may hereafter acquire, by cessions, as well of the jurisdiction as of the soil,* so far as the soil may be the property of the party

making the cession, at the time of making it. * * * * The subject matter is the territory of the United States out of the limits of every State, and consequently under the exclusive power of the people of the United States." (19 How. 613, 615.)

It thus appears that "the territory of the United States" includes impartially all territory outside the several States over which the United States exercises jurisdiction, sovereignty and dominion, without regard to character, form, kind, or even existence of local organization or government; that Congress in its discretion may make political subdivisions of this outlying dominion or of parts of it; that it may set up or tear down these political subdivisions at will; that their relation to the general government is practically that of counties to states; that they are in substance municipal corporations; but that neither setting up nor tearing down these political subdivisions has any effect on the constitutional relations of such territory to the Republic. In its constitutional aspects such a district remains throughout simply a part of the territory within the jurisdiction of the United States, not included in any State and must be governed by or under the authority of Congress. (5 Wheat. 319; 16 How. 193, 198; 19 How. 450; 19 How. 544; 19 How. 613; 101 U. S. 133; 127 U. S. 550; 169 U. S. 674.)

It has, however, been soberly contended that these decisions and many like them have all been overruled by the insertion in the Thirteenth Amendment to the Constitution of the expression already referred to, "within the United States *or any place subject to their jurisdiction.*" The argument is, of course, that the mention of places subject to the jurisdiction of the United States in addition to the phrase "within the United States" is not mere pleonasm, and therefore can only be explained as a recognition by the Constitution of *lands* subject to the jurisdiction of the United States yet not within the United States.

We need not discuss the reasoning by which this result is sought to be attained. The fundamental weakness lies in the assumption that the clause cannot otherwise be accorded operative force. There are *places* which are not land or territory; and there was at least one such place where slavery had flourished in its most horrible form, where above all other places it needed to be wiped out and destroyed—a place with no certainty to be described as territory of the United States or as "within the United States;" and yet a place most certainly subject to the jurisdiction of the United States. It lay between the decks of an American slave ship on the high seas.

No one, we think, will be ready to deny the need of surely including that place. Nor will many try to maintain that it would be safely included in the terms of the amendment if the clause in question were omitted.

II.

The decisions already quoted would seem to render practically synonymous two important questions, viz.: Is Porto Rico territory of the United States and is it under the dominion, sovereignty and jurisdiction of the United States?

In an early case, Chief Justice Marshall, speaking for the Supreme Court, says: "The usage of the world is, if a nation be not entirely subdued, to consider the holding of acquired territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose." (*American Ins. Co.* v. *Cantor*, 1 Pet. 541. See also *United States* v. *Hayward*, 2 Gal. 501.)

We made our military occupation of Porto Rico. At the treaty of peace it was expressly ceded to us. The terms in the treaty of peace are meagre, and the future status of the island and its inhabitants is expressly left in large measure to the determination of Congress. But the cession is express and its terms such as to cover both sovereign title to the soil and jurisdiction; and the case is squarely within the terms of the opinion just quoted as well as those we have seen used by Justice Curtis. (19 How. 613.)

It has been contended, and in some unexpected quarters, that the reservation for future Congressional action placed the whole subject of status beyond the scope of constitutional restrictions and absolutely in the power of Congress, and that the treaty became "the supreme law of the land" under the second section of Article VI,[1] to which, it is urged, even the provisions of the Constitution must bow. Even cursory read-

[1] The section reads: "This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Art. VI, Sec. 2.

ing of the section should show that it is only treaties complying with the Constitution that are given any attribute of supreme law, as well as the entire propriety of the decision of the Supreme Court that: "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government." (*The Cherokee Tobacco*, 11 Wall. 616, 620. See also, *License Cases*, 5 How. 613; *Head-money Cases*, 112 U. S. 580; *Whitney* v. *Robertson*, 124 U. S. 190; *Chinese Exclusion Case*, 130 U. S. 581.) The object of this section is simply to make the Federal Constitution and all forms of legislation under it, passed in accordance with its terms, superior to any conflicting State laws, thus rendering the Federal government, within its sphere, supreme over the several State governments.

By familiar rules of law, Congress, under this reservation in the treaty, can make no provision that could not have been directly embodied in the treaty itself. In other words, its powers under the treaty to regulate the status of the territory or its inhabitants must be exercised within any limitations which the Constitution may have imposed, and all such limitations are implied in the treaty.

Not only, however, are the provisions of the treaty ceding the island such as to make it territory of the United States within this decision in the Cantor case, but we find also a present condition in the island which brings it within the terms of a much more recent decision. The United States is actually governing Porto Rico, imposing laws there, levying taxes, building roads and maintaining schools. It is the only government so exercising acts of dominion, sovereignty and jurisdiction in the island. Very recently the Supreme Court has pointed out that a government which has lawfully acquired territory and is the only government which can impose laws within it, has the entire jurisdiction, dominion and sovereignty over it. (*Shively* v. *Bowlby*, 152 U. S. 48.) It seems to have escaped the attention of some very busy people that by legislating for Porto Rico Congress has treated it as "territory of the United States," since it thereby assumes and exercises dominion, sovereignty and jurisdiction. It seems to have been equally overlooked that the judicial power of our government extends over as broad a country as do the legislative and executive powers. Wherever Congress may promulgate its acts, and the Executive proceed to enforce them, there too the Supreme Court may de-

clare those acts valid or void, as they comply or not with the terms of the Constitution.

In the recent case of *Goetze* v. *United States* (103 Fed. 72) Judge Townsend of the District of Connecticut, after calling attention to the above quoted opinion of Chief Justice Marshall in the Cantor case, states his conclusions concerning Porto Rico thus: "The soil became part of the United States by conquest. The treaty of cession only confirmed on the part of Spain a title already good against all the rest of the world. We have the authority of *Fleming* v. *Page*, that acquiring the title to soil, making it part of the United States as regards foreign nations, does not bring it within the sphere of the Constitution. * * * New territory is not brought under the Constitution by acquisition of the soil; otherwise *Fleming* v. *Page* could not have been decided as it was. This is done either by an incorporation of the inhabitants into the Union or by an extension of our laws and institutions throughout the territory. This cannot be done by conquest, but only by legislation or treaty." (p. 78.)

The case of *Fleming* v. *Page*, cited by Judge Townsend, arose out of our military occupation of Tampico, Mexico, during the war with that state. As the Supreme Court was careful to point out, our rights in Tampico were those of "*mere military occupation*" and the Court under Chief Justice Taney carefully drew the broad distinction between "*mere military occupation*" and "*acquisition confirmed by cession by the treaty of peace*," (p. 619) just as Chief Justice Marshall had done in the Cantor case (1 Pet. 541) and Justice Story in the Hayward case (2 Gal. 501). Judge Townsend has indeed in the opening of his opinion noted that the facts in *Fleming* v. *Page* were those of mere military occupation. But by an unfortunate change of terms when drawing his deductions from this decision he has in re-stating its grounds substituted for the term "*mere military occupation*" the term "*acquisition of title to the soil*," as descriptive of the facts in the Fleming case, a phrase which he also treats as sufficient to include the operation of the present treaty of cession; a condition of affairs most carefully distinguished from mere military occupation in all the cases mentioned, as involving precisely opposite consequences from the "mere military occupation" which was considered in *Fleming* v. *Page*. The two terms are as wide apart as war and peace.

That the effect of the Treaty of Paris was something more than a mere confirmation by Spain of a title to the soil already

good against all the rest of the world, is clear from a perusal of the cases already mentioned. As Kent says: "During the war the conqueror has only a usufructuary right to the territory he has subdued, and the latent right and title of the former sovereign continues until a treaty of peace by its silence or by its express stipulation shall have extinguished his title forever." (1 *Kent Comm.* 169.) That military occupation of a tract does not transfer the allegiance of its inhabitants is laid down in the cases cited. That, on the other hand, cession of the tract by treaty of peace does incidentally transfer the allegiance of its inhabitants is also well settled. (1 *Kent Comm.* p. 178, Note a; *Vattel*, b. 3, ch. 13, Sec. 200; *U. S.* v. *Percheman*, 7 Pet. 51. 73; *Strother* v. *Lucas*, 12 Pet. 410, 438.) Indeed, the Treaty of Paris itself recognizes this, since it contains an express clause permitting individual inhabitants of the ceded islands to retain their Spanish citizenship on certain conditions, in order to avoid *pro tanto* this recognized natural result of the cession by treaty.

Judge Townsend seems to have failed to note all this and the failure has led him into the misconstruction of the decision in *Fleming* v. *Page*. Upon correcting the change of terms and the incautious statement as to the effect of the treaty of cession the *non sequitur* in Judge Townsend's opinion is apparent. His conclusion is then left entirely unsupported either by his own reasoning or by any authority.[2] Viewed in any sense except that of empty tautology his conclusions are, we believe, not only unsupported by authority, but in conflict with not less than six propositions of law, which, as we are attempting to show, have been settled by repeated decisions of the Supreme Court, viz.:

1. That "the United States" and "territory of the United States" are terms which include all land under the Federal dominion, sovereignty and jurisdiction. (5 Wheat. 319; 19 How. 450, 543; 16 Wall. 72; 101 U. S. 133.)

2. That territory occupied by the conqueror in war, and ceded, both soil and jurisdiction, by the treaty of peace, becomes part of the territory of the nation to which it is annexed. (1 Pet. 541; 2 Gal. 501; 19 How. 613.)

[2] The recent decision of Judge Lochren of the Minnesota District, in the case of Ortiz (100 Fed. Rep. 955) in which he reaches a conclusion directly opposed to that of Judge Townsend, should not be overlooked. Those who have known Judge Lochren's legal abilities will attach great weight to his opinion.

3. That territory over which a power exercises sole dominion, sovereignty and jurisdiction, is territory of that power. (152 U. S. 48; 19 How. 613.)

4. That Congress can create no constitutional distinctions between different parts of the Federal territory. (19 How. 450.)

5. That, the power of Congress to make laws being entirely the creation of the Constitution and dependent on it, there can be no power in Congress to enact laws where the Constitution itself does not extend. (3 How. 225; 19 How. 393; 114 U. S. 44.)

6. That territory is not determined by citizenship, but citizenship by territory. (Fourteenth Amendment, Sec. 1; 16 Wall. 72.)

Some of these propositions we have already considered. The others we shall shortly touch upon.

III.

Assuming as demonstrated that Porto Rico is part of the territory of the United States and that the Constitution recognizes no difference in territory within the jurisdiction and sovereignty of the United States, except only the division into territory within the several States and territory outside the several States, the question arises whether or not the safeguards of the Constitution, and particularly those we have quoted as being more especially in dispute, have application within the "outlying dominion" of the United States.

But recently the Supreme Court said:

"The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may be well admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. * * * The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their political rights are fran-

chises which they hold as privileges in the legislative discretion of the Congress of the United States. This doctrine was fully and forcibly declared by the chief justice delivering the opinion of the Court in *National Bank* v. *County of Yankton*, 101 U. S. 129. See also *American Insurance Co.* v. *Cantor*, 1 Pet. 511; *United States* v. *Gratiot*, 14 Pet. 526; *Cross* v. *Harrison*, 16 How. 164; *Dred Scott* v. *Sandford*, 19 How. 393." (*Murphy* v. *Ramsey*, 114 U. S. 44, 45.)

It will be noted that the Supreme Court here, in the year 1884, long after the war, cites with approval the famous case of *Dred Scott* v. *Sandford*, in which the subjects now presented were more fully discussed than in any other case that has ever come before the Court.

The decision in the Dred Scott case proceeded principally on three propositions, viz.: First, that the general prohibitions of the Constitution extended wherever the power of Congress ran to rule or to make laws; second, that the Constitution applied only to the white race and not to the negro race; third, that the provision of the Act known as "The Missouri Compromise" by which a slave taken by his master into free territory would become free, was a breach of the constitutional provision that no one should be deprived of his property without due process of law. From the first proposition, which is the point now under discussion, no dissent was expressed. From the second and third propositions above quoted, which were sustained by the majority of the Court, Justices Curtis and McLean dissented most vigorously, and their views on those two points were later to a great extent incorporated in the Thirteenth and Fourteenth Amendments.

The decision is particularly noticeable for this: That even the tremendous exigencies of the question of slavery in the Northern territories could not induce a single Northern judge to swerve for an instant from the doctrine that wherever in any territory the power of Congress went, it went limited and restrained by the general limitations of the Constitution under which alone it had authority to legislate. On that point the decision in the Dred Scott case was without dissent and still stands as the law. The doctrine there laid down had been the unanimous doctrine of the Court under Marshall and Story. (*Loughborough* v. *Blake*, 5 Wheat. 319; *American Insurance Company* v. *Cantor*, 1 Pet. 541.) It had been the unanimous doctrine of the Court under Taney's Chief Justiceship before the Dred Scott case arose. (*Cross* v. *Harrison*, 16 How. 164.)

During the first twenty years after the war, the same doctrine is unanimously reiterated and the Dred Scott case cited with approval. (*The Slaughter House Cases*, 16 Wall. 72; *National Bank* v. *Yankton*, 101 U. S. 129; *Murphy* v. *Ramsey*, 114 U. S. 44.) And still more recently the same doctrine has been again and again announced and different clauses of the Constitution held applicable throughout the territory of the United States. (*Callan* v. *Wilson*, 127 U. S. 540; *Springville* v. *Thomas*, 166 U. S. 707; *American Publishing Company* v. *Fisher*, 166 U. S. 464; *Thompson* v. *Utah*, 170 U. S. 346; *United States* v. *Wong Kim Ark*, 169 U. S. 664.)

The opinion of Chief Justice Taney in the Dred Scott case contains perhaps the ablest statement yet delivered of the law on this point, and from it we quote at length:

"The powers of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of government. The powers of the government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. *And when the territory becomes a part of the United States, the Federal government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a government and sovereignty. It has no power of any kind beyond it, and it cannot, when it enters a territory of the United States, put off its character, and assume discretionary or despotic powers which the Constitution has denied to it.* It cannot create for itself a new character separated from the citizens of the United States and the duties it owes them under the provisions of the Constitution. *The territory being a part of the United States, the government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out;* and the Federal government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved.

"A reference to a few of the provisions of the Constitution will illustrate this proposition.

"For example, no one, we presume, will contend that Congress can make any law in a territory respecting the establishment of religion, or the free exercise thereof, or abridging the

freedom of speech or of the press, or the right of the people of the territory peaceably to assemble, and to petition the government for the redress of grievances.

"Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

"These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the general government, and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the Fifth Amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. * * *

"The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under territorial government, as well as that covered by States. *It is a total absence of power everywhere within the dominion of the United States*, and places the citizens of a Territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the general government might attempt under the plea of implied or incidental powers. And if Congress itself cannot do this—if it is beyond the powers conferred on the Federal government—it will be admitted, we presume, that it could not authorize a Territorial government to exercise them. It could confer no power on any local government, established by its authority, to violate the provisions of the Constitution." (Taney, C. J., *Dred Scott* v. *Sandford*, 19 How. 393.)

The dissenting justices, Curtis and McLean, briefly stated like views, Justice Curtis saying:

"If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power? To this I answer, that, in common with all the other legislative powers of Congress, it finds limit in the express prohibitions on Congress not to do certain things; that, in the exercise of

the legislative powers, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution."

and Justice McLean:

"In such cases no implication of a power can arise which is inhibited by the Constitution or which may be against the theory of its construction."

It has been the fashion in some quarters of late to speak of the doctrine that the Constitution operates *ex proprio vigore* as one born from the brain of Calhoun and matured by lawyers and statesmen interested in the maintenance of slavery, until it ripened out in the Dred Scott decision. The pretense seems to be without justification. The doctrine that constitutional restrictions of legislative power operate *ex proprio vigore* is an absolute and essential condition of the existence of such restrictions. It was established in one of the very earliest cases to come before the Supreme Court of the United States, while John C. Calhoun was yet a college student. (*Marbury* v. *Madison*, 1 Cranch, 176, 180.) A restraint on legislation which operates only when the legislature enacts that it will be restrained is no restraint at all. These great doctrines of constitutional law were, it is true, relied on by Calhoun, but they were settled doctrines of law from which no Justice of the Supreme Court has ever yet dissented, either before, during, or since Calhoun's day.

IV.

We now come to a more specific consideration of the particular clauses of the Constitution which have given rise to the discussion of these questions, and which are quoted at the beginning of this article. What is the meaning of the term "The United States" in the uniform taxation clause and in the citizenship clause of the Fourteenth Amendment?

A recent writer in the *Review of Reviews* maintains that the term "The United States" in the Constitution and its amendments alike, invariably refers to the Federal Government, as distinguished from the Republic itself, or to the several States joining in the Union, and in no case has the meaning, commonly attributed to it, of the whole Republic. He cites no authorities sustaining his contention.

The term "The United States" in the uniform taxation clause was before the Court for the first time in *Loughborough* v. *Blake*, 5 Wheat. 319. The Court then included both Marshall and Story, of whom the former wrote the opinion, in which the Court held that the term was not restricted to the several States, but included "the whole * * * of the American Empire," "Our great Republic which is composed of States and Territories." The same clause was later brought to the attention of the Court in a case arising out of the acquisition of California. Substantially the same ruling was made, the Court saying in answer to the claims that the tariff laws had not been extended over California, that it had not been made part of a collection district, and that goods should therefore be admitted free of duty: "The right claimed to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision in the Constitution which enjoins that all duties, imposts, and excises, shall be uniform throughout the United States. * * * The ratification of the treaty made California part of the United States, and, * * * as soon as it became so, the territory became subject to the acts which were in force to regulate foreign commerce." *Cross* v. *Harrison*, 16 How. 198.

These views have been repeatedly referred to as correct. (19 How. 501; 7 Wall. 446; 114 U. S. 45; 116 U. S. 407; 152 U. S. 48; 170 U. S. 56.)

Any person advocating a different doctrine before the Supreme Court will certainly be called upon to show good reason for overturning the solemn decisions of the greatest expounders of the Constitution. Campaign speeches or occasional arbitrary acts of officers of the executive department or even Acts of Congress are likely to be accorded little weight by the judges when thrown in the balance against the deliberate and unanimous decisions of the Court under the leadership of Marshall, Story, Taney, Waite and Miller, reversing unconstitutional acts on these grounds.

It seems to be beyond reasonable question that the clauses in the early amendments of the Constitution sometimes referred to as the Bill of Rights, operate of their own force throughout the territory of the United States. The recent decisions to that effect, going even to the holding of Acts of Congress unconstitutional, are too numerous to be lightly set aside. (*Scott* v. *Sandford*, 19 How 393; *National Bank* v. *Yankton*, 101 U. S.

129; *The Slaughter House Cases*, 16 Wall. 72; *Murphy* v. *Ramsey*, 114 U.S. 44; *Callan* v. *Wilson*, 127 U.S. 540; *Springville* v. *Thomas*, 166 U. S. 707; *American Publishing Company* v. *Fisher*, 166 U. S. 464; *Thompson* v. *Utah*, 170 U. S. 346.)

That a distinction should be successfully drawn between the uniform taxation clause and these clauses of the so-called Bill of Rights over at least two decisions of the Supreme Court rendered by some of its greatest judges, seems in itself highly improbable. Moreover, if the history of events leading up to the adoption of the Constitution teaches us anything of the thoughts of the men who drafted it, it is that they were quite as alive as anyone to the truth, long afterwards put in words by the Supreme Court, that "The power to tax is the power to destroy." The clear perception that the power of taxation without representation involved the power to evade every safeguard of the Bill of Rights had brought on the Revolution. Accordingly, while the Constitutional Convention thought it unnecessary to incorporate any other provision of the Bill of Rights into the Constitution, it insisted on the provision that duties, imposts and excises should be uniform "throughout the United States," thus securing substantial representation on that point to all parts of the Republic by preventing the exemption of any part. Certainly no instance of taxation without representation was more directly presented to the minds of the founders of the Republic than that of a home government imposing special taxes on colonies which had no voice in the assessment or levy of a tax from which the central body was exempt.

It is no answer to say that we are devising no unequal or heavy burdens or that we are not likely to oppress our colonies. In 1774 the tax on tea was petty. But while producing almost no revenue, it was retained as an assertion of the power to tax. It sufficed to bring on the Revolution. Nor is it an answer to say that we plan only to take off a tax, not to impose one. The very proposition that our tariff laws shall not apply to the Philippines has as its corollary that imports from Manila shall pay import duties in New York and San Francisco. The power to exempt involves the power to impose. The power to differentiate in any way the taxes in territory having no direct representation is the power to tax without representation. And if the taxing power in the new possessions is not restrained by the Constitution, it is absolute, without limit, and regulated by no law.

The words of the Great Commoner, "Where law ends tyranny begins," were still ringing in men's ears when the Constitution was adopted. It will be difficult to make the Supreme Court believe that there is implied in the Constitution the very power which the American Colonies had denied as tyrannical, had fought against and overthrown.

V.

And yet we by no means contend that the present tariff levied on imports and exports from Porto Rico to other parts of the United States is necessarily unconstitutional. The duties, imposts and excises that must be uniform throughout the United States are those laid and collected for the support of the Federal Government. The uniformity clause has no application to local taxation for local purposes. Territorial governments have levied local taxes for their own support, and no one has thought of questioning their validity. And what Congress can do through the agency of a Territorial government it can do directly. (*Supra.*)

The clause under which State import and export duties are prevented is sub-division 2 of Sec. 10 of Art. 1: "No *State* shall, without the consent of Congress, lay any imposts, or duties, on imports or exports," etc. This section was clearly framed to prevent independent action of any State prejudicial to the common interest. In the case of a Territory there can be no such independent action to the prejudice of the central power, since all Territorial laws are necessarily within the absolute control of the Federal government. Consequently, there was no need of having the provisions of this sub-division apply to any local Territorial governments set up by the United States, and they are thus exempt from both letter and spirit of this restriction. The fifteen per cent. import and export duties levied in Porto Rico may well be claimed to be of this local character, since by the very terms of the statute the proceeds are ultimately paid into the local treasury.

There is, however, one clause of very doubtful validity in the Porto Rican Act, viz: That it exempts that territory and transactions therein from the internal revenue taxes levied elsewhere. While no Porto Rican is now complaining of this exemption, the question may readily arise in contests over the validity of Porto Rican instruments which would otherwise require to be stamped.

VI.

The provision of the first section of the Fourteenth Amendment that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," has also come up for construction before the Supreme Court of the United States. The lack of a definition of citizenship of the United States at one time left room for much discussion. In the *Slaughter House Cases* where this section of the Fourteenth Amendment was construed, Justice Miller, in pronouncing the opinion of the Court, calls attention to the matter as follows:

"It had been the occasion of much discussion in the courts, by the executive departments, in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia, or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. * * * To establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States and also citizenship of the State, the first clause of the first section was formed. * * * The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State." (16 Wall, 72, 73.)

This opinion of Justice Miller is approved by the Supreme Court in the very recent case of *United States* v. *Wong Kim Ark*, 169 U. S. 664. It is thus apparent that the writer of the article in the *Review of Reviews* is entirely at odds in regard to these clauses with the greatest authorities we have on the construction of the Federal Constitution, Marshall, Story, Taney and Miller, as well as with the other judges who joined in these decisions.

Were it necessary to fortify the opinions of these great judges, it might well be urged that at the time of adopting the Fourteenth Amendment, the meaning that Marshall had attached to the phrase was dominant in men's minds. The term "The United States" was then in common and ordinary use as meaning the whole of the American Empire. Every map of

the United States published since 1865 clearly shows it. And it would probably be exceedingly difficult to find instances between 1865 and 1895 of new use of that term as meaning only the several States of the Union. By familiar rules of constitutional construction the legislative use of the term previously defined by the Courts indicates an intention to use it in the sense so defined.

VII.

When one comes before the Supreme Court of the United States to urge that its decisions which have obtained for many years are erroneous and should be overruled, it is important, especially in cases affecting fundamental constitutional provisions, to show the Court that the rule previously laid down, if followed, will work great injury to the Republic and injustice to individuals, which might be avoided under a different construction. In the absence of such reasons the Court is little likely to overturn its earlier rulings merely because some phrase long since construed might possibly originally have been construed otherwise; and the Court will doubtless lean strongly upon the doctrine of *stare decisis*, if it finds it necessary so to do, to avoid departing from the former decisions of the highest Court rendered by the greatest constitutional lawyers we have yet known. It should not be forgotten that the Supreme Court is established for the very purpose of having a body not likely to be swayed by the partisan policies of the moment.

Of the advocates of the theory that the Constitution has no force in our new possessions, few—very few—are men trained to the law. Under such circumstances one would naturally expect that, the facts permitting, the dominant strain in the argument would be the great practical difficulties resulting from the rule hitherto obtaining, the terrible injustice likely to result from its further enforcement, and the immense benefits likely to flow from a change.

It is noticeable that the argument is not pressed on these grounds.

Indeed, it is difficult to find any deliberate or careful statement of reasons for desiring a different construction of the restraining clauses of the Constitution. We do find brief suggestions of three difficulties, viz: (*1*) That conferring American citizenship on a large number of men of different races is likely to be a dangerous matter; (*2*), that, under the present construction, our system of government is not well adapted to

the government of colonies; and (*3*), that the requirement of uniformity of duties, imposts and excises will prevent our maintaining the "open door" in the Philippines and thus obtaining the "open door" in China.

The danger from the acquisition of Filipino citizens is easily exaggerated. The term "citizen" in the Federal law is precisely analogous to the term "subject" in the laws of other nations. (*The Pizarro*, 2 Wheat. 245; *United States* v. *Wong Kim Ark*, 169 U. S. 664; 2 *Kent Comm.* 258.) It involves allegiance and protection but not political franchises unless the citizen resides in a State. (*Murphy* v. *Ramsay*, 114 U. S. 44, 45.) The danger that any overwhelming portion of the population of the Philippine Islands will migrate to the American continent is not a serious one. It involves the previous development of conditions in Filipino life likely to render the Filipino a fairly desirable citizen. Moreover, the familiar principles applicable to Indians holding tribal relations would probably affect the subject to a considerable extent.

The claim that our system of government is not adapted to holding colonies would seem to be put practically on the other two propositions. Congress has unlimited power to adopt any form of government for any part of the outlying dominion, save and except only as it is restrained by the general prohibitions of the Constitution. It may choose any known form of government for these islands, territorial, colonial, provincial or other, or devise totally new forms; but it may not deprive the inhabitants of the territory of the fundamental protections of the Bill of Rights, or of their rights to American citizenship, or impose on them taxes for the support of the Federal Government different from those imposed on the rest of the Union. Our system seems admirably adapted to *holding* colonies for the very reason that it forbids *exploiting* them, and that our Federal system holds out ultimate possibilities, when honest government, education and civilization shall have done their work, of sisterhood with the other States. It is the uniform taxation provision alone which seems to be occasioning difficulties in the minds of those who claim that the old construction of the Constitution should be changed.

It may be that the requirement of uniformity of duties may render necessary careful revision of our trade relations with other countries. The "open door" in the Philippines with precisely the present protective tariff on the American continent, is probably not the only condition on which the "open

door" in China is to be had, even if it is to be had on those terms. And it is reasonably to be expected that the Supreme Court, before changing its construction of the whole theory of the Constitution, will desire a very full showing that the consequences prophesied for the old construction will be inevitable and will also in the long run surely be evil.

Discussion of these questions is beyond the limits of this article. Its scope is only to call attention to the fact that the law, as already laid down by the Supreme Court, is, that the newly acquired islands are within the dominion, sovereignty and jurisdiction of the United States; that they are territory of the United States and therefore parts of the United States within the uniform duties clause and the citizenship provisions of the Fourteenth Amendment; that Congress enters this new territory under the authority of the Constitution, unable to exercise therein any power over the persons or property of the inhabitants beyond what that instrument confers and unable lawfully to deny them any rights thereby reserved.

Since the days of John Hampden and the Ship Money case, students of the common law have well understood that legal restriction of the taxing power lies at the foundation of all individual liberties of the citizen or subject. Attempts at assertion of unlimited power of taxation have been made in both English and American history, but their results are written in the dethronement and death of kings and the destruction of empire. The limitation of the operation of this most important constitutional safeguard to a part only of the dominion of the United States would clearly be a long step toward transforming the great Democracy into a great Oligarchy. It is scarcely to be expected that the Supreme Court, with its clear perceptions of the results of its decisions, will be the body to take this first step.